SERUAN GEMILANG MAKMUR SDN BHD v. PEGAWAI KEWANGAN NEGERI PAHANG

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
[CIVIL APPEAL NO: C-01-395-11-2013]
15 FEBRUARY 2016

CIVIL PROCEDURE: *Judicial review – Proceedings – Application for leave – Extension of time to apply for leave – Whether application made out of prescribed period – Whether court has jurisdiction to entertain applications that has not complied with 40 day time limit – Whether reasons given for delay sufficient and amount to good reason – Whether trial judge's exercise of discretion not to grant extension of time flawed – Rules of the High Court 1980, O. 53 r. 3(6)*

On 9 December 2002, the appellant filed a suit against the State of Government of Pahang and the Director of Forestry for State of Pahang for breach of contract. After a full trial, the High Court entered judgment in favour of the appellant in the sum of RM37,127,471.60. On 7 March 2008, the Senior Assistant Registrar issued a certificate under s. 33 of the Government Proceedings Act 1956, which was served on the State Legal Adviser. There was no payment made by the State Government of Pahang and Director of Forestry for the State of Pahang. On 16 July 2008, the appellant filed an application for a *mandamus* order which included the State Secretary and the respondent as defendants ('the first *mandamus* application') which was later withdrawn. On 15 October 2008, the appellant filed an application for judicial review for a *mandamus* order against the Menteri Besar of Pahang ('the second *mandamus* order'). On 20 April 2009, the High Court granted the second *mandamus* application directing the Menteri Besar of Pahang to pay the monies stipulated in the certificate dated 7 March 2008 within 14 days. On 22 April 2009, a notice of appeal was filed by the State of Pahang against the said decision. On 9 October 2009, the Court of Appeal allowed the Menteri Besar's appeal, *inter alia*, on the grounds that the wrong party was named as respondent and that the second *mandamus* application was out of time as time began to run from 7 April 2008. By a notice of appeal dated 5 November 2009, the appellant applied for leave to appeal to the Federal Court, which was dismissed on 5 October 2010. On 20 October 2010, the appellant filed an application at the High Court for leave to apply for judicial review ('the third *mandamus* application'). The appellant also applied for an extension of time to make the application, which was vigorously opposed by the respondent. On 23 November 2010, the High Court allowed an extension of time and granted leave to apply for judicial review. On 17 December 2010, the respondent appealed to the Court of

A Appeal against the High Court order. On 26 November 2012, the Court of Appeal allowed the respondent's appeal, *inter alia*, on the ground that the leave application, with a prayer for extension of time, ought to have been served on the respondent. The Court of Appeal remitted the appellant's application to the High Court for *inter partes* hearing. On 3 October 2013, the B High Court dismissed the application for extension of time and the third *mandamus* application. Hence, this appeal. The issues that arose were (i) whether the trial judge erred in law and in fact in applying the ordinary general principles governing discretion to grant an extension of time to apply for judicial review in a case of violation of fundamental rights guaranteed by the Federal Constitution and (ii) whether the trial judge erred in law and in C fact in rejecting the explanation given by the appellant in making the application for extension of time and leave to apply for judicial review.

Held (dismissing appeal with costs)
Per Mohd Zawawi Salleh JCA (for the majority):

D **(1)** The *prima facie* rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained. It is also a pre-condition to the exercise of discretion in his or her favour that the applicant show 'good reasons' for the delay. The court would not grant the application for extension unless it was positively satisfied that E it was proper to do so. It is trite that the High Court has no jurisdiction to entertain applications for judicial review if they fail to comply with the 40 day time limit. Thus, compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction. (paras 71 & 78)

(2) Whilst O. 53 r. 3(6) of the Rules of the High Court 1980 ('RHC') give F little or no guidance regarding factors to be taken into consideration in the exercise of discretion, there is now a considerable body of case law regarding the exercise of discretion to extend the 40 day time limit imposed by O. 53 r. 3(6). The court's power to extend time should be exercised on a principle basis: that they should articulate the criteria G they are applying and should provide reasons for their ruling. (para 77)

(3) Apart from naming the wrong party and the time taken to have proceedings disposed, no other reason had been given for the delay. There was no material whatsoever that had been placed before this court to explain why the appellant was out of time in taking out the second H *mandamus* application and for that matter, even the first *mandamus* application. The appellant failed to provide good reasons for failing to file the application for leave for judicial review within time. There was nothing advanced by the appellant to show that he had a good reason, or any reason at all for that matter for failing to file the application

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promptly apart from uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second *mandamus* application. Thus, the trial judge's exercise of her discretion was not flawed. There was no reason to interfere with her discretion not to grant an extension of time (paras 82, 83 & 86)

Per Abdul Aziz Abdul Rahim JCA (dissenting):

(1) The appellant had behaved sensibly in applying for *mandamus* against the Menteri Besar, having acted on advice by their legal advisors, and the application was allowed by the High Court. Unfortunately, the appellate court had a different view resulting in the matter of whether the Menteri Besar was the correct party to be issued with an order of *mandamus* which was put before the Federal Court. The present application was filed by the appellant's as soon as the Federal Court had pronounced its decision. The appellant was thus entitled to wait for the outcome of the Federal Court decision on the Menteri Besar appeal because they were successful before the High Court but the latter decision was reversed by the Court of Appeal. The appellant should not be penalised for adopting that strategy. (para 34)

(2) The explanation given by the appellant for the delay, in the circumstances of the case, was sufficient to amount to a good reason for the judge to exercise her discretion to grant the appellant the leave for extension of time and eventually to hear the application for leave for a judicial review on its merits. Moreover, the appellant had a valid judgment against the respondent and a certificate under s. 33 of the Government Proceedings Act 1956 had been issued against, and served on, the respondent. (paras 34 & 35)

(3) The State Government of Pahang, in refusing or failing to pay the appellant the amount which the appellant was legally and lawfully entitled to, had in fact denied the appellant's constitutional right to the property which was the judgment sum payable under the certificate. In such a case, 'the court must, *ex debitio justitiae*, grant the appellant threshold standing to proceed'. (para 36)

***Bahasa Malaysia** Headnotes*

Pada 9 Disember 2002, perayu memfailkan saman terhadap Kerajaan Negeri Pahang dan Pengarah Perhutanan bagi Negeri Pahang kerana kemungkiran kontrak. Selepas perbicaraan penuh, Mahkamah Tinggi memasukkan penghakiman memihak kepada perayu berjumlah RM37,127,471.60. Pada 7 Mac 2008, Penolong Kanan Pendaftar mengeluarkan sijil di bawah s. 33 Akta Prosiding Kerajaan 1956, yang dikemukakan kepada Penasihat Undang-

Undang Negeri. Tiada pembayaran dibuat oleh Kerajaan Negeri Pahang dan Pengarah Perhutanan bagi Negeri Pahang. Pada 16 Julai 2008, perayu memfailkan permohonan untuk perintah *mandamus* yang merangkumi Setiausaha Kerajaan Negeri dan responden sebagai defendan ('permohonan *mandamus* pertama') yang kemudiannya ditarik balik. Pada 15 Oktober 2008, perayu memfailkan permohonan bagi semakan semula kehakiman untuk perintah *mandamus* terhadap Menteri Besar Pahang ('perintah *mandamus* kedua'). Pada 20 April 2009, Mahkamah Tinggi membenarkan permohonan *mandamus* kedua sekaligus mengarahkan Menteri Besar Pahang membayar wang yang dinyatakan dalam sijil bertarikh 7 Mac 2008 dalam tempoh 14 hari. Pada 22 April 2009, notis rayuan difailkan oleh Negeri Pahang terhadap keputusan tersebut. Pada 9 Oktober 2009, Mahkamah Rayuan membenarkan rayuan Menteri Besar, antara lain, atas alasan pihak yang salah telah dinamakan sebagai responden dan permohonan *mandamus* kedua kesuntukan masa kerana masa mula berjalan dari 7 April 2008. Melalui notis rayuan bertarikh 5 November 2009, perayu memohon kebenaran untuk merayu kepada Mahkamah Persekutuan, yang ditolak pada 5 Oktober 2010. Pada 20 Oktober 2010, perayu memfailkan permohonan di Mahkamah Tinggi bagi kebenaran untuk memohon semakan semula kehakiman ('permohonan *mandamus* ketiga'). Perayu juga memohon lanjutan masa bagi pemfailan permohonan itu, yang ditentang hebat oleh responden. Pada 23 November 2010, Mahkamah Tinggi membenarkan lanjutan masa dan membenarkan semakan semula kehakiman. Pada 17 Disember 2010, responden merayu kepada Mahkamah Rayuan terhadap perintah Mahkamah Tinggi. Pada 26 November 2012, Mahkamah Rayuan membenarkan rayuan responden, antara lain, atas alasan permohonan kebenaran itu, bersama-sama permohonan untuk lanjutan masa, sepatutnya dikemukakan kepada responden. Mahkamah Rayuan mengembalikan semula permohonan perayu ke Mahkamah Tinggi untuk perbicaraan secara *inter partes*. Pada 3 Oktober 2013, Mahkamah Tinggi menolak permohonan untuk lanjutan masa dan permohonan *mandamus* ketiga. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan ialah (i) sama ada hakim bicara terkhilaf dari segi undang-undang dan fakta dalam mengguna pakai prinsip umum yang mengawal selia budi bicara dalam membenarkan lanjutan masa diberikan untuk kehakiman dalam kes pencabulan hak asasi yang dijamin oleh Perlembagaan Persekutuan; dan (ii) sama ada hakim bicara terkhilaf dari segi undang-undang dan fakta dalam menolak penjelasan yang diberikan oleh perayu dalam membuat permohonan lanjutan masa dan kebenaran memohon semakan semula kehakiman.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohd Zawawi Salleh HMR (majoriti):

(1) Peraturan *prima facie* adalah satu permohonan untuk memohon kebenaran bagi semakan semula kehakiman yang dibuat di luar tempoh ditetapkan tidak akan dilayan. Adalah juga satu prasyarat bagi

pelaksanaan budi bicara bagi pemohon menunjukkan 'good reasons' bagi kelewatan itu. Mahkamah tidak akan membenarkan permohonan lanjutan melainkan ia berpuas hati bahawa adalah wajar untuk berbuat sedemikian. Adalah tidak dipertikaikan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk melayan permohonan bagi semakan semula kehakiman jika mereka gagal untuk mematuhi had masa 40 hari. Maka, pematuhan tempoh masa yang ditetapkan oleh peraturan adalah utama kerana ia menjurus kepada bidang kuasa.

(2) Walaupun A. 53 k. 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memberi sedikit atau tiada bimbingan mengenai faktor-faktor untuk dipertimbangkan dalam pelaksanaan budi bicara, terdapat badan kes undang-undang mengenai pelaksanaan budi bicara untuk melanjutkan had masa 40 hari yang dikenakan oleh A. 53 k. 3(6). Kuasa mahkamah untuk melanjutkan masa perlu dilaksanakan atas dasar prinsip: bahawa mereka harus menyatakan dengan jelas kriteria yang dipohon dan harus memberi alasan untuk keputusan mereka.

(3) Selain menamakan pihak yang salah dan masa yang diambil untuk menyelesaikan prosiding, tidak ada alasan lain diberikan untuk kelewatan tersebut. Mahkamah tidak memberikan apa-apa material untuk menjelaskan mengapa perayu berada di luar masa dalam membuat permohonan *mandamus* kedua dan juga permohonan *mandamus* pertama. Perayu gagal memberikan alasan yang kukuh terhadap kegagalan untuk memfailkan permohonan kebenaran untuk semakan semula kehakiman dalam jangka masa ditetapkan. Perayu tidak mengemukakan alasan yang kukuh, atau apa-apa alasan mengapa ia gagal memfailkan permohonan itu dengan segera selain ketidaktentuan mengenai pihak mana yang sewajarnya dinamakan sebagai responden dan tempoh masa diambil untuk menyelesaikan isu ini melalui proses rayuan berkenaan dengan permohonan *mandamus* kedua. Oleh itu, pelaksanaan budi bicara hakim bicara tidak khilaf. Tiada alasan untuk mengganggu budi bicara beliau untuk tidak membenarkan lanjutan masa.

Oleh Abdul Aziz Abdul Rahim HMR (menentang):

(1) Perayu berkelakuan wajar dalam memohon untuk *mandamus* terhadap Menteri Besar, setelah bertindak atas nasihat oleh penasihat undang-undang mereka, dan permohonan dibenarkan oleh Mahkamah Tinggi. Malangnya, Mahkamah Rayuan mempunyai pandangan berbeza mengenai isu sama ada Menteri Besar adalah pihak yang betul untuk diberi perintah *mandamus* yang mana dikemukakan di Mahkamah Persekutuan. Permohonan ini difailkan oleh perayu sebaik sahaja Mahkamah Persekutuan mengumumkan keputusannya. Perayu dengan itu berhak untuk menunggu hasil keputusan Mahkamah Persekutuan atas rayuan Menteri Besar kerana mereka telah berjaya di Mahkamah Tinggi tetapi keputusan tersebut telah diakas oleh Mahkamah Rayuan. Perayu tidak sepatutnya dihukum dalam penggunaan strategi itu.

(2) Penjelasan diberikan oleh perayu atas kelewatan itu, dalam hal keadaan kes, adalah mencukupi sebagai alasan yang baik bagi hakim untuk menggunakan budi bicara beliau bagi memberikan perayu permohonan untuk lanjutan masa dan seterusnya mendengar permohonan bagi kebenaran untuk semakan semula kehakiman berdasarkan merit. Selain itu, perayu mempunyai penghakiman yang sah terhadap responden dan sijil di bawah s. 33 Akta Prosiding Kerajaan 1956 telah dikeluarkan terhadap, dan disampaikan kepada responden.

(3) Kerajaan Negeri Pahang, dalam keengganan atau kegagalan membayar perayu jumlah yang mana perayu secara sah dan menurut undang-undang berhak kepada, telah pada hakikatnya menafikan hak perlembagaan perayu terhadap harta yang merupakan jumlah penghakiman dibayar di bawah sijil ini. Dalam hal keadaan ini, 'the court must, *ex debitio justitiae*, grant the appellant threshold standing to proceed'.

Case(s) referred to:

Arumugam Pillai v. Government of Malaysia [1975] 1 LNS 2 FC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Basanti Prasad v. Chairman, Bihar School Examination Board And Others AIR 2009 SC 3162 ***(refd)***

Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***

Dehri Rohtas Light Railway Co Ltd v. District Board, Bhojpur & Ors AIR [1993] SC 802 ***(refd)***

John Peter Berthelsen v. Director-General Of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Mohd Nordin Johan v. Attorney General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

PV Narayana v. AP State Road Transport Corporation [2013] (4) ALD 386 ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. Commissioner for Local Administration, ex parte Croydon London Borough Council [1989] 1 All ER 1033 ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Ramchandra Shankar Deodhar & Ors v. The State Of Maharashtra & Ors AIR [1974] SC 259 ***(refd)***

Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 LNS 110 FC ***(refd)***

Sabah Berjaya Sdn Bhd v. Director General Of Inland Revenue Department & Anor [1996] 1 LNS 93 HC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 159 ***(refd)***

Tengku Anoomshah Tengku Zainal Abidin & Anor v. Collector Land Revenue, North-East District, Penang & Anor [1995] 3 CLJ 434 HC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 13(1), 160
Government Proceedings Act 1956, s. 33
Rules of Court 2012, O. 53 r. 3(7)
Rules of the High Court 1980, O. 53 r. 3(6)

Other source(s) referred to:
The White Book Service 2010: Civil Procedure Volume 1, para 54.5.1

For the appellant - Gopal Sri Ram (Lua Ai Siew, Elyazura Md Shaarani & David Yii Hee Keat with him); M/s Peter Lai, Rajoo & Aiza
For the respondent - Muhammad Shafee Abdullah (Ahmad Hanir Hambaly, SFCs, S Sivanendran & Peter Skelchy, FCs with him); State Advisor's Office, Pahang

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim JCA (dissenting):

[1] This is an appeal by the applicant in Originating Motion No. 25-10-2010 against the decision of the learned High Court Judge at Kuantan dismissing the applicant's application for leave for judicial review (in encl. 2) with cost of RM8,000.

[2] The application was dismissed on the ground of inordinate delay in making such application under O. 53 r. 3(6).

[3] Having heard counsels and after reading the appeal records my learned brother judges – Justice Mohd Zawawi Salleh and Justice Ahmadi Hj Asnawi – decided to dismiss the appeal. They were of the view that there are insufficient materials before the trial judge for the latter to exercise the court's discretion to grant the application. I, however, have a different view. I decided to allow the appeal. The following are my reasons for allowing the appeal.

[4] First of all, it is pertinent to note that there are two kind of leave sought by the applicant/appellant. The first leave is leave for extension of time to file for leave for a judicial review and the second leave is leave to apply for a judicial review for an order of *mandamus*. The learned judge heard and decided to dismiss the first leave. Thus, it follows that the application for the second leave also falls without it being heard on its merits. Secondly,

A the judgment obtained by the appellant against the defendant in Guaman Sivil No. MT(2)-21-9-2009 at High Court Kuantan (the original suit) is a valid judgment having gone through the rigmarole of the appeal process up to the Federal Court and the judgment still remains unsatisfied till today.

B **[5]** For a better understanding of the factual matrix of the appeal, I reproduced the chronology of events submitted by the counsel for the appellant. This chronology is not in dispute:

	Civil Suit
9.12.2002	Appellant filed a suit against State Government of Pahang and Director of the Forestry Department *vide* Kuantan Civil Suit No. MT(2)-21-9-2002.
25.5.2007	Judgment entered against the defendant in the civil suit after a full trial.
13.2.2008	Court of Appeal dismissed the defendant's appeal against the judgment.
(17.9.2008	Federal Court dismissed defendant's motion for leave to appeal).
7.3.2008	High Court issued certificate under section 33 GPA.
7.4.2008	Section 33 certificate was served on State Legal Adviser.
	Judicial Review (1) [Kuantan High Court OM No. (MT1)25-5-2008]
16.7.2008	The appellant applied for leave to apply for judicial review – State Secretary and the Finance Officer were named as the respondents. The appellant sought to amend and include the Menteri Besar as a party.
14.10.2008	The appellant withdrew the application.
	Judicial Review (2) [Kuantan High Court OM No. (MT1) 25-9-2008]
15.10.2008	The appellant applied for leave – Menteri Besar of Pahang was named as the respondent.
20.4.2009	High Court granted leave to apply for judicial review.
31.3.2010	Court of Appeal allowed the appeal by Menteri Besar of Pahang
5.10.2010	Federal Court by a majority dismissed appellant's motion for leave to appeal.
	Judicial Review (3) [Kuantan High Court 25-10-2010]
20.10.2010	The appellant filed application for extension of time to make an application for judicial review and leave to apply for judicial review. The respondent (State Finance Officer) is named as the respondent.

15.11.2010	The application (*Ex parte*) was served on the AG's Chambers.
23.11.2010	High Court allowed an extension of time and granted leave to apply for judicial review.
1.12.2010	Application for judicial review was served on the respondent.
9.12.2010	Application for judicial review was served on the State Legal Adviser.
17.12.2010	The respondent appealed to Court of Appeal against the High Court order dated 23.11.2010.
26.11.2012	Court of Appeal accepted the respondent's argument *inter alia* that the leave application (with a prayer for extension of time) ought to have been served on the respondent and allowed the respondent's appeal. Case remitted to the High Court for *inter partes* hearing.
3.10.2013	High Court heard and dismissed the application for extension of time and refused the appellant leave to appeal for judicial review.

[6] In its application before the High Court, the appellant had prayed, *inter alia*, for extension of time to file for leave for judicial and secondly for leave to apply for an order of *mandamus* against the respondent directing the respondent to make payment of the judgment sum in favour of the appellant as certified in the certificate issued under s. 33 of the Government Proceedings Act 1956 ('GPA') dated 3 July 2008 in the original suit. The said certificate was served on the State Legal Advisor on 7 April 2008. But the respondent did not make any payment. As can be seen from the chronology of events above, on 16 July 2008 the appellant applied for leave to apply for judicial review (the first JR application). But for some reasons known to the appellant this application was withdrawn. The appellant's first JR application was also filed out of time.

[7] On 15 October 2008, the appellant filed another application for judicial review for an order of *mandamus*, not against the defendant in the original suit but against the Menteri Besar of Pahang *vide* OM No. MT(1)-25-9-2008 (the second JR application). The appellant succeeded. The High Court allowed the application on 20 April 2009. However on appeal to this court by the Menteri Besar, the appeal was allowed on the ground that the Menteri Besar was the wrong party. (See *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 CA – the Menteri Besar's appeal). The court said the proper party should be the respondent.

[8] In the Menteri Besar's appeal, the majority of this court (comprising of Justice Jeffrey Tan JCA (as he then was) and Justice Sulaiman Daud JCA) held that the appellant's application for judicial review was filed out of time;

A and there was no application for leave for extension of time. However Justice Zaleha Zahari JCA (as Her Ladyship then was) took a different position and held that the application by the appellant was within time. Nevertheless, the court was unanimous that the Menteri Besar was the wrong party to be sued. The appellant's leave application to appeal to the Federal Court against this B court decision in the Menteri Besar's appeal was dismissed.

[9] Thereafter on 20 October 2010, the appellant filed OM 25-10-2010 application for extension of time to make application for judicial review and for leave to apply for judicial review. In this judicial review application (the third JR) the appellant named the State Financial Officer as the respondent. C In the application the appellant also included an application for leave for extension of time to apply for judicial review. The third JR was made *ex parte*.

[10] On 23 November 2010, the High Court allowed the extension of time and granted leave to apply for judicial review. Thereafter the application was D served on the respondent. The respondent appealed to this court and the appeal was allowed with the court held that the leave application (with a prayer for extension of time) ought to have been served on the respondent. The case was then remitted to the High Court to be heard *inter partes*.

E **[11]** On 3 October 2013 the High Court heard and dismissed the application for extension of time and refused the appellant's leave to apply for judicial review. Hence this appeal before us.

[12] The issue before the High Court was whether the appellant's application was out of time and if it was, is there acceptable explanation of F the delay? The learned High Court Judge held that it was and the explanation for the delay was not acceptable. The learned High Court Judge's finding can be found in paras. 15 and 16 of the judgment:

> [15] Saya merujuk kepada ekshibit "LS2" afidavit Lee Sin diikrar pada 20-10-2010 iaitu Perintah bagi Perakuan di bawah s. 33 Akta Prosiding G Kerajaan 1956 yang dikeluarkan kepada Kerajaan Negeri Pahang dan Pengarah Perhutanan Negeri Pahang Darul Makmur adalah bertarikh 7.3.2008. Perintah bertarikh 7.3.2008 tersebut telah diserahkan kepada Kerajaan Negeri Pahang dan Pengarah Perhutanan Negeri Pahang Darul Makmur pada 7.4.2008. Permohonan Semakan Kehakiman di sini difailkan pada 20.10.2010. Terdapat kelewatan lebih kurang 2 tahun H 6 bulan dan ia tidak mematuhi kehendak A. 53 k. 3(6) iaitu perlu difailkan dalam tempoh 40 hari dari tarikh keputusan diberitahu kepada Responden.
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> [16] Jika sekalipun tarikh pada 16.7.2008 diambil kira iaitu tarikh Permohonan untuk Perintah *Mandamus* telah memasukkan Setiausaha I Kerajaan Negeri Pahang dan Pegawai Kewangan Negeri Pahang sebagai defendan-defendan, ia masih dibuat di luar tempoh masa. Permohonan untuk Perintah *Mandamus* tersebut ditarik balik oleh Pemohon pada

14.10.2008. Pada 15.10.2008 satu permohonan Perintah *Mandamus* berikutnya difailkan terhadap Menteri Besar Pahang untuk mematuhi Perintah Perakuan s. 33 bertarikh 7.3.2008. Jika sekalipun nama responden dijadikan pihak di dalam permohonan Pemohon tersebut, masih lagi ia difailkan di luar tempoh masa iaitu lebih kurang 7 bulan 7 hari. Dalam semua keadaan permohonan Pemohon sememangnya difailkan di luar tempoh masa 40 hari menurut A. 53 k. 3(6) KMT 1980 ataupun di bawah A. 53 k. 3(6) KMM 2012.

[13] The learned High Court Judge said under O. 53 r. 3(6) of the RHC 1980, an application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds of application first arose or when the decision is first communicated to the applicant. The learned judge found, as can be seen from the above quoted para. 15 of the High Court judgment, that certificate under s. 33 of the GPA was issued on 7 March 2008 and served on the respondent on 7 April 2008. The application was filed on 20 October 2010 – there was a delay of approximately two years and six months.

[14] The learned judge rejected the appellant's explanation for the delay that the Federal Court's decision on the *mandamus* application against the Menteri Besar was only given on 5 October 2010; therefore the 40 days period should begin from that date. The learned High Court Judge said that the rule is clear that the 40 days is to be counted 'from the date when the grounds of the application first arose or when the decision is first communicated to the applicant'. The learned judge held that:

Dalam hal ini tarikh keputusan mengenai Perakuan di bawah s. 33 telah dimaklumkan pertama kalinya kepada defendan-defendan di dalam kes 21-9-2002 adalah pada 7.4.2008 dan tarikh pertama kali permohonan *mandamus* dibuat pada 16.7.2008. Tarikh keputusan Mahkamah Persekutuan pada 15.10.2010 bukanlah tarikh keputusan pertama kalinya diberitahu kepada respondent ataupun tarikh permohonan pertama kali dibuat.

[15] The learned judge also relied on a passage from the judgment of Jeffrey Tan JCA (as he then was) in the Menteri Besar's appeal to reject the appellant's argument. The passage reads:

[63] Given that there was no direction that payment was suspended, the duty to pay arose upon service of the s. 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008 when service of the s. 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with the rules of court, and the order of *mandamus* should have been there and then refused.

[16] It is observed that though O. 53 r. 3(6) stipulates that an application for leave for judicial review shall be made promptly, the court still has the discretion to extend the 40 days period stipulated therein if the court considers there is good reason for doing so.

[17] Before us learned counsel for the respondent submitted that the learned judge on the facts alluded to above had exercised her discretion correctly and in accordance with the established principles and Her Ladyship's decision does not warrant appellate intervention. It was argued that since this court had, by majority in the Menteri Besar's appeal, held that the judicial review was out of time, the learned judge was bound by the finding of fact of the delay in making the application. Thus it was argued that issue estoppel/*res judicata* in respect of the appellant's ability to challenge the finding on the commencement date and the fact that the second *mandamus* application was out of time in the circumstances applies here: See *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351; [1993] 3 MLJ 713; *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783.

[18] Learned counsel for the respondent, Tan Sri Shafee, submitted that the issue in this appeal is not so much about leave but it is about jurisdiction. He argued that there is no material before the court to explain the delay and on which the court could rightly exercise its discretion for extension of time. He submitted that this is substantive law and fundamental; and cannot be disregarded though the appellant's application for an order of *mandamus* in this case involves question of fundamental rights to property under art. 13 of the Federal Constitution. This, he said, should be so because art. 13 speaks of deprivation of property 'in accordance with law'; and "law" under art. 160 of the Federal Constitution includes procedural law. He also submitted that there was suppression of fact in the appellant's application. He argued that there was no reference at all to the first JR application which was withdrawn in the second JR application by the appellant. This application under appeal, he said, is the second JR application by the appellant.

[19] Learned counsel further submitted that it is settled law that a failure to commence the judicial review process within the 40 day time frame goes to jurisdiction of the court to hear the application. He cited and referred to the Federal Court's decision in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161 where the Federal Court disapproved the proposition by Gopal Sri Ram JCA (as he then was), (and who incidentally is the lead counsel for the appellant in this appeal), in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 159 as *obiter* and does not reflect the correct proposition of law as discussed by the Federal Court in *Mersing Omnibus Co Sdn Bhd v. The*

Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54 and *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168. A

[20] One of the issues before the Federal Court in *Wong Kin Hoong & Anor (supra)* is whether the law as to leave application under O. 53 of the RHC 1980 as stated in *Mersing Omnibus (supra)* and *Ravindran (supra)* is still good law as these two cases were decided prior to the amendment of O. 53 r. 3(6) of the RHC 1980. B

[21] *Tang Kwor Ham & Ors (supra)* was the majority decision of this court. The judgment was delivered by Gopal Sri Ram JCA (as he then was). The gist of Gopal Sri Ram JCA remarks in *Tang Kwor Ham & Ors* that did not find favour with the Federal Court is that in hearing leave application for extension of time to apply for extension of time the court should undertake a closer scrutiny of the merits of the case and that "it is not an improper exercise of discretion for a judge who forms the preliminary view that an application for extension ought to be refused to hear full arguments on the merits of the case for the purpose of testing his preliminary conclusion against other issues that arise in the case, including the strength and weakness of the respondent's case". C D

[22] In *Mersing Omnibus (supra)* the Federal Court held that the application for leave was filed after six weeks had lapsed from the decision of the Minister and the applicant had neither sought an extension of time nor accounted for the delay to the satisfaction of the judge; so leave for judicial review should not be granted. In *Ravindran (supra)* the trial court rejected the applicant's explanation for delay in applying for the extension of time and also dealt with the merits of the case if the explanation for the delay was accepted. The Federal Court held that as the learned trial judge had rejected the explanation for the delay, "it follows that the learned judge had no jurisdiction to hear the application for leave for an order of *certiorari*'. E F

[23] In *Wong Kin Hoong & Anor (supra)* the Federal Court answered the question posed in the negative and held that the principles on leave application under O. 53 in *Mersing Omnibus (supra)* and *Ravindran (supra)* are still good law though the two cases was decided before the amendment to the said O. 53. Further it was observed the proposition as stated in *Tang Kwor Hoong (supra)* was made in 'complete absence of discussion or reference to the Federal Court decision in *Mersing Omnibus* and *Ravindran*'. G H

[24] Following the above discussion, the current state of law in relation to leave application under O. 53 r. 3(6) of the RHC 1980 (now O. 53 r. 3(7) of the Rules of Court 2012) is thus: leave application must be made promptly, and in any event within 40 days from the date when the grounds for the application first arose or the date the decision was communicated to I

A the applicant. The court however has a discretion to extend the 40 days period if there is good reason for doing so. In considering whether there is good reason to extend the 40 days period there must be explanation of the delay in making the application; and the court is not to consider the merits of the case at this stage.

B **[25]** So, coming back to the present appeal, is there material before the trial judge to consider giving leave to extend time (the 40 days period) for the appellant to apply for leave for judicial review? The respondent said there was none and the learned judge agreed with it. The appellant however said that there is and this can be seen from the chronology of events mentioned C above.

[26] At this juncture it is worth to note that Jeffrey Tan JCA in the Menteri Besar's appeal had acknowledged that the application was made out of time and without any application for leave to extend the 40 days period. This means that even at the High Court stage the issue as to the extension of time D to file for leave for judicial review and the reasons for the delay in making the application were never canvassed and decided. Likewise when the appeal came up for hearing before this court, the court did not have the opportunity to consider whether the learned judge had correctly decided to grant the leave for judicial review when the application itself was made out of time.

E **[27]** In the present appeal the appellant had, together with the application for leave for judicial review, also applied for leave to extend time. However the learned judge rejected the explanation given by the appellant for the delay in making the application. The explanation given by the appellant was that the appellant had filed and obtained leave for judicial review for an order of F *mandamus* against the Menteri Besar as the respondent. But the Menteri Besar had challenged the leave and the matter had gone up to the Federal Court. The decision by the Federal Court on the challenge by the Menteri Besar was given only on 5 October 2010. Following that decision the appellant filed the application which is the subject matter of the present appeal. The application G was filed on 16 October 2010 – a matter of ten days after the Federal Court's decision.

[28] The learned judge held that the 40 days period should be counted from 7 April 2008 that is the date when the certificate under s. 33 of the Government Proceedings Act 1956 was served on the State Legal Advisor H or at worse from 16 July 2008 when the appellant filed the first application for judicial review (Kuantan High Court OM No. (MT1) 25-5-2008) which was later withdrawn on 14 October 2008.

[29] However in my view the learned judge had not given sufficient consideration to the fact that upon the withdrawal of the first JR application I the appellant immediately filed, on 15 October 2008, a fresh second JR application (the Menteri Besar's appeal). This application had a chequered

history. This application was allowed by the High Court. But it had gone through a rigmarole of appeal process until it reached the Federal Court. But unfortunate for the appellant the Federal Court agreed with this court that the Menteri Besar was the wrong party to be sued. In the circumstances is it not reasonable for the appellant to wait until the outcome of its application to appeal to Federal Court against the decision of this court in the Menteri Besar's appeal? I posed this question because at the material time the appellant had been granted leave by the High Court to proceed for an order of *mandamus* against the Menteri Besar until this court, on appeal by the latter, ruled against the appellant. In this regard I would adopt the minority view by Zaleha Zahari JCA (as she then was) in the Menteri Besar's appeal. The relevant paragraph of the judgment reads:

> On the facts of this case it is clear that the respondent only commenced enforcement proceedings by way of an application for judicial review after all appeals against the said judgment had been disposed of. The judicial review application for *mandamus* resorted to by the respondent was to overcome the problem when confronted with the recalcitrance of the defendants in the original suit to pay the said judgment. Clearly, in the present circumstances the fact that the respondent took such an action after all appeals had been disposed of should not be held against them. I am in agreement with the respondent's counsel that the filing of the application for judicial review for an order or *mandamus* within forty days of the Federal Court decision (17 September 2008) that the respondent had acted "promptly" and in compliance with O. 53 r. 3(6) of the Rules.

[30] In *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v. Collector Land Revenue, North-East District, Penang & Anor* [1995] 3 CLJ 434, it was said that the court has unfettered discretion to grant an extension of time to apply for judicial review, so long as there are some material on which the court can exercise its discretion in favour of the appellant.

[31] Learned counsel for the appellant submitted that the relevant material in support of the appellant's application for extension of time to apply for *mandamus*, was before the High Court. He submitted the historical background averred by the respondent in its affidavit opposing the leave application which the respondent said constituting material facts to have been suppressed by the, are in truth facts that reinforced the appellant's case for extension of time. Learned counsel for the appellant reiterated that the delay was occasioned by reason of a view taken by counsel on which party should be impleaded. The earlier application against the State Secretary and the respondent was withdrawn on 14 October 2008. The appellant on advice took the view that the Menteri Besar was the correct party, a view which the High Court agreed with in proceedings commenced against the Menteri Besar. On appeal to this court, two of the judges on the panel hearing the appeal (ie, the Menteri Besar's appeal) took a different view while the third member of the panel addressed only the time issue. The leave application

before the Federal Court was dismissed with one judge entering a dissent. In other words, learned counsel for the appellant submitted, the question of law as to whether the Menteri Besar was the correct party was one upon which the judges disagreed; the appellant therefore was not guilty of any intentional delay.

[32] It was also submitted that the third JR application for leave and extension of time was served on the Attorney General in accordance with the provisions of O. 53 of the RHC 1980 and the Attorney General thought it fit not to appear and object or oppose the application for an extension of time to apply for leave for judicial review. Does this not count for something? It was submitted that this shows that the application is *bona fide* and have merits. The stand taken by the Attorney General not to object to the application also, it was submitted, strengthened the appellant's case that there is no inordinate delay on its part in making the application.

[33] The threshold for granting of leave for extension of time under O. 53 r. 3(6) of the RHC 1980 is low. The appellant need only to show and satisfied the court that there is a good reason to do so. In *R v. Commissioner for Local Administration, ex parte Croydon London Borough Council* [1989] 1 All ER 1033 cited and referred to by the appellant, Woolf LJ said:

> While in the public law field, it is essential that the courts should scrutinise with care any delay in making application and a litigant who does delay in making an application is always at risk, the provision of RSC Ord 53, r. 4 and s. 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is in my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled.

[34] Learned counsel submitted that in this case the appellant had behaved sensibly in applying for *mandamus* against the Menteri Besar having acted on advice by their legal advisors and the application was allowed by the High Court. Unfortunately however, the appellate court had a different view resulting in the matter of whether the Menteri Besar was the correct party to be issued with an order of *mandamus* was put before the Federal Court. The whole process took about two years. The present application (ie, the third JR) was filed by the appellant's as soon as the Federal Court had pronounced its decision. I agree with this submission. In my view the appellant is entitled to wait for the outcome of the Federal Court's decision on the Menteri Besar appeal because they were successful before the High Court but the latter decision was reversed by this Court on Appeal. I do not think the appellant should be penalised for adopting that strategy. It is my view that in the circumstances the appellant has behaved sensibly and reasonably I think the explanation given by the appellant for the delay is, in the circumstances of this case, sufficient to amount to a good reason for the

learned judge to exercise her discretion to grant the appellant the leave for extension of time and eventually to hear the application for leave for a judicial review on its merits.

[35] Moreover in this case, the appellant has a valid judgment against the respondent and a certificate under s. 33 of the Government Proceedings Act 1956 had been issued against, and served on, the respondent. It is now settled by the Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321 that once a certificate under s. 33 of the Government Proceedings Act 1956 has been issued there is a duty on the part of the relevant State Government to comply with the terms of the certificate.

[36] The State Government of Pahang, in this case represented by the respondent, in refusing or failing to pay the appellant the amount stated in the certificate (the amount which the appellant is legally and lawfully entitled to) when the certificate was served on the respondent has in fact denies the appellant's constitutional right to the property which is the judgment sum payable under the certificate. In such a case 'the court must, *ex debitio justitiae*, grant the appellant threshold standing' to proceed – see *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532.

[37] The court also must not refuse leave if the point taken in an application under O. 53 r. 3(6) is 'not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion' – see *Mohd Nordin bin Johan v. Attorney General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 and *John Peter Berthelsen v. Director – General Of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160.

[38] Learned counsel for the appellant cited and referred to two Indian cases – *Ramchandra Shankar Deodhar & Ors v. The State Of Maharashtra & Ors* AIR [1974] SC 259, *PV Narayana v. AP State Road Transport Corporation* [2013] (4) ALD 386, – where it was held that where fundamental rights are violated and the delay is not directly attributable to the party seeking the relief the court would be justified to grant the relief and cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like.

[39] In *PV Narayana v. AP State Road Transport Corporation* 2013 (4) ALD 386, a delay of five to 18 years in making application is not a ground to refuse relief. Similarly in the case of *Basanti Prasad v. Chairman Bihar School Examination Board And Others* AIR 2009 SC 3162 and *Dehri Rohtas Light Railway Co. Ltd v. District Board, Bhojpur & Ors* AIR [1993] SC 802.

[40] Though in Indian law there is no equivalent of O. 53 r. 3(6), the principles alluded to the case law referred to above regarding the exercise of discretion where it involves issues of fundamental rights are equally relevant in our case if the delay in making the application is adequately explained.

[41] In *Sabah Berjaya Sdn Bhd v. Director General Of Inland Revenue Department & Anor* [1996] 1 LNS 93; [1996] 5 MLJ 366, the application for extension of time was made approximately seven years from the alleged default complaint of; yet the court granted the leave on being satisfied that the appellant has accounted for the delay. Likewise in this present appeal my view is that the appellant has adequately explained the delay. The facts contributing to the delay were also alluded to by the respondent in their affidavit in reply.

[42] In conclusion, I will say that an application for judicial review under O. 53 of the RHC (now O. 53 of the ROC 2012) in normal circumstance is a two stage process. The first stage is application for leave to issue the judicial review. The second stage, if the applicant is successful at the first stage, is the hearing of the judicial review on its merits. In situation where the applicant is out of time (ie, exceed the 40 days period) the application is a three stage process. The first stage is to apply for extension of time. As I have alluded to earlier in this judgment, the threshold for this stage is low. At this stage the applicant must explain the delay and if the court finds that the explanation is a good reason to excuse the delay then leave to extend time should be granted. In order to determine whether the explanation for the delay amounts to good reason, the court must consider the whole application in its entirety including whether the application is frivolous or not. This does not mean that the court at this stage must consider the merits of the application for judicial review. The court however has to be satisfied that application justified further arguments and the delay is not due to the applicant's indolence.

[43] For the above reasons, I will allow this appeal with cost to the appellant.

Mohd Zawawi Salleh JCA (majority):

Introduction

[44] This appeal is directed against the decision of the High Court Kuantan (Mariana Yahya J, presiding) dated 3 October 2013 dismissing the appellant's application for an extension of time to apply for leave to commence judicial review proceedings.

[45] This appeal is concerned with whether time should be extended to apply for leave for judicial review. However, this, strictly speaking, is a side show. In the main show is the application for leave to apply for an order of *mandamus* against the respondent, directing the respondent to make payment of the judgment sum in favour of the applicant as stipulated in the certificate issued pursuant to s. 33 of the Government Proceedings Act 1956, dated 7 March 2008, in the original suit. On 7 April 2008, the certificate was served on the State Legal Advisor acting on behalf of the Government of Pahang and the Director of Forestry for the State of Pahang. There was no payment.

The Antecedent Facts And Proceedings

[46] This case has had a chequered history which needs to be explained in order to appreciate how the present position is arrived at.

[47] On 9 December 2002, the appellant filed a suit against the State of Government of Pahang and the Director of Forestry for State of Pahang in Kuantan Civil Suit No. MT(2)-21-9-2002 for breach of contract.

[48] After a full trial, the High Court entered judgment in favour of the appellant in the sum of RM37,127,471.60 with interest at the rate of 8% p.a. from 31 December 2000 to date of settlement. The respondent appealed against the said judgment to the Court of Appeal.

[49] On 13 February 2008, the Court of Appeal dismissed the appellant's appeal on the ground that the record of appeal has not been filed within time. An application for leave to appeal to the Federal Court was dismissed on 17 September 2008.

[50] In the meantime, on 7 March 2008, the Senior Assistant Registrar issued a certificate under s. 33 of the Government Proceedings Act 1956 and was served on the State Legal Adviser. There was no payment made by the State Government of Pahang and Director of Forestry for the State of Pahang.

[51] On 16 July 2008, the appellant filed on application for a *mandamus* order which included the State Secretary and the respondent as defendants ("the first *mandamus* application"). The appellant also sought to amend and include the Menteri Besar of the State of Pahang as a party. However, on 14 October 2008, the appellant withdrew the first *mandamus* application.

[52] On 15 October 2008, the appellant filed an application for judicial review for a *mandamus* order against the Menteri Besar of Pahang ("the second *mandamus* order").

[53] On 20 April 2009, the High Court granted the second *mandamus* application directing the Menteri Besar of Pahang to pay the monies stipulated in the certificate dated 7 March 2008 within 14 days.

[54] On 22 April 2009, a notice of appeal was filed by State of Pahang against the decision given on 20 April 2009.

[55] On 9 October 2009, the Court of Appeal allowed the Menteri Besar's appeal, *inter alia*, on the grounds that the wrong party was named as respondent and the second *mandamus* application was out of time as time began to run from 7 April 2008.

[56] By notice of appeal dated 5 November 2009, the appellant applied for leave to appeal to the Federal Court. The Federal Court on 5 October 2010 dismissed the appellant's application.

[57] On 20 October 2010, the appellant filed an application at the High Court for leave to apply for judicial review ("the third *mandamus* application"). The appellant also applied for an extension of time to make the application. The application was vigorously opposed by the respondent.

[58] On 23 November 2010, the High Court allowed an extension of time and granted leave to apply for judicial review.

[59] On 17 December 2010, the respondent appealed to the Court of Appeal against the High Court order dated 23 November 2010. On 26 November 2012, the Court of Appeal allowed the respondent's appeal, *inter alia*, on the ground that the leave application (with a prayer for extension of time) ought to have been served on the respondent. The Court of Appeal remitted the appellant's application to the High Court for *inter partes* hearing.

[60] On 3 October 2013, the High Court heard and dismissed the application for extension of time and the third *mandamus* application with costs of RM8,000. Hence, this appeal.

The Appeal

[61] In the memorandum of appeal, various grounds are raised assailing the impugned judgment but before us, learned senior counsel for the appellant focused his arguments on the following grounds:

(a) The learned judge erred in law and fact in applying the ordinary general principles governing discretion to grant an extension of time to apply for judicial in a case of violation of a fundamental right guaranteed by the Federal Constitution; and

(b) The learned judge erred in law and in fact in rejecting the explanation given by appellant in making the application for extension of time and leave to apply for judicial review.

Discussion And Decision

[62] Learned senior counsel for the appellant submitted that this is a case in which the appellant obtained a money judgment against the State of Pahang and a certificate under s. 33 of the Government Proceedings Act 1956, has been issued but the respondent failed and/or refused to make payment of the said judgment. Therefore, the appellant's fundamental rights guaranteed under art. 13(1) of the Federal Constitution had been infringed.

[63] Learned senior counsel contended that the general law regarding delay and the doctrine of laches which relate to ordinary civil actions, such as actions for damages, should not be the controlling principles in deciding an application for extension of time to apply for judicial review where fundamental rights had been violated.

[64] In support of his submission, reliance was placed upon four Indian cases: *Ramchandra Shankar Deodhar & Ors v. The State of Maharashtra & Ors* [1974] SC 259; *PV Narayanan v. UP State Road Transport Corporation* 2013 (4) ALD 386; *Basanti Prasad v. Chairman, Bihar School Examination Board And Others*, AIR 2009 SC 3162; *Dehri Rohtas Light Railway Co Ltd v. District Board, Shahabad*, AIR [1993] SC 802.

[65] Reference was also made to the case of *Sabah Berjaya Sdn. Bhd. v. Director of Inland Revenue department & Anor* [1996] 1 LNS 93; [1995] 5 MLJ 366 where the application for extension of time was made approximately seven years from the alleged default complained of. On the factual matrix of the case, the court was satisfied that the appellant has accounted for the delay in making the application for leave for an order of *certiorari* and allowed the application for extension of time.

[66] Learned senior counsel emphasised that the court has a wide discretion to grant an extension of time to apply for leave for judicial review. The court should have regard to the whole history of the matter, the conduct of the parties, the nature of litigation and the effect that granting an extension of time would have on other persons involved.

[67] Another argument that was put forward by senior counsel is that in considering extension of time to apply for judicial review the test to be applied is which order would, in the context of the particular case, be favourable to the interest of justice. In this instant appeal, it was contended that the appellant is entitled to the relief claimed as it has a judgment in its favour that the state has either failed or refused to pay.

[68] In reply, learned senior counsel for the respondent argued that the prohibition against a person being deprived of his property under art. 13 of the Federal Constitution is subject to the relevant governing provision of the law. Article 13(1) of the Federal Constitution provides:

> (i) No person shall be deprived of property save in accordance with the law.

[69] Learned senior counsel finds support in the decision of *Arumugam Pillai v. Government of Malaysia* [1975] 1 LNS 2; [1975] 2 MLJ 29, where the Federal Court held that:

> Article 13(1) of the Constitution provides that "no person shall be deprived of property save in accordance with the law". On this constitutional issue, the learned judge said in his grounds of decision that he had in a previous judgment followed the decision of the Supreme Court of Burma in *Tinsa Maw Naing v. Commissioner of Police Rangoon & Anor* [1950] Burma Law Reports 17 *on the construction of "in accordance with law" and held that "when the Constitution speaks of law, it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.*

A …

> The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be.

B (emphasis added).

[70] The authorities have established that the expression "law" includes procedural law. In *Re Tan Boon Liat* [1977] 1 LNS 110; [1977] 2 MLJ 108, the court held that:

C

> … in accordance with law" in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression "in accordance with law" were to be construed as to exclude procedure then it would make nonsense of Article 5.

D (See also *Lee Kwan Woh v. Public Prosecutor* [2009] 5 CLJ 631).

[71] It trite that the High Court had no jurisdiction to entertain applications for judicial review if they fail to comply with the 40 day time limit. Thus, compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction. In *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan*

E *Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161, the court had this to say:

> Secondly, we are of the view that the remarks of Gopal Sri Ram JCA as produced earlier in this judgment were *obiter.* These obiter remarks reflect

F an incorrect proposition of law as there was a complete absence of discussion or reference to the Federal Court decisions in *Mersing Omnibus* and *Ravindran*. Finally, we are of the view that the principle in *Mersing Omnibus* and *Ravindran* is still good law. Whilst it is true that both *Mersing Omnibus* and *Ravindran* were decided under the old O. 53 r. 1A of the RHC but the principle in relation to an application to extend time to file

G an application for judicial review remains the same.
>
> In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the

H court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[72] In our view, the learned judge had correctly applied the principles governing an application for extension of time to apply for leave for judicial review. In determining whether to extend time, Her Ladyship dealt first with

I the appellant's explanation for the delay. Her Ladyship held that the explanation given by the appellant was unacceptable and consequently dismissed the appellant's application for an extension of time. Her Ladyship did not consider the merits of the leave application for judicial review.

Ground (b)

[73] Learned senior counsel for the appellant submitted that the High Court has unfettered discretion to grant an extension of time to apply for judicial review, so long as there are some material on which the court can exercise its discretion in favour of the appellant (See *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v. Collector Land Revenue, North-East District, Penang & Anor* [1995] 3 CLJ 434).

[74] Continuing his submission, learned senior counsel contended that in this instant appeal the delay in making the application for leave for third *mandamus* was unintentional. He went into some detail regarding the factual background of the case. Learned senior counsel pointed out that the delay was occasioned by reason of a view taken by appellant's counsel on which party should be impleaded. The earlier application against the State Secretary and the respondent was withdrawn on 14 October 2008. The appellant on advice took the view that the Menteri Besar was the correct party, a view which the High Court agreed with in the proceedings against the Menteri Besar. On appeal to the Court of Appeal, each of judges of the court give their reasons. While their view did not coincide on all issues discussed, they were unanimous on the point that the Menteri Besar was the wrong party and that the instant respondent is the correct party. The leave application before the Federal Court was dismissed with one judge entering a dissent.

[75] Learned senior counsel maintained that the application for extension of time and for leave to apply the third *mandamus* was in accordance with O. 53 of the RHC 1980 and served on the Attorney General who thought it fit not to appear and oppose the applications. It showed that there was no inordinate delay on the part of the appellant and there is merit in the application.

[76] Now, O. 53 r. 3(6) of the RHC provides as follows:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[77] At the outset, we must say that delays in making applications for judicial review may be explained, but it is clear that not every explanation provides an acceptable reason for granting an extension of time. Whilst O. 53 r. 3(6) give little or no guidance regarding factors to be taken into consideration in the exercise of discretion, there is now a considerable body of case law regarding the exercise of discretion to extend the 40 day time limit imposed by O. 53 r. 3(6). The courts have accepted that their power to extend time should be exercised on a principle basis: that they should articulate the criteria they are applying and should provide reasons for their ruling.

[78] In our view, the *prima facie* rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained and it is a pre-condition to the exercise of discretion in his or her favour that the applicant show an "a good reasons" of the delay. The court would not grant the application for extension unless positively satisfied it is proper to do so. The judicial rulings indicate that what explanations for delay will be acceptable may vary according to the circumstances of each case.

[79] The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the date when the first decision communicated to the applicant.

[80] In this instant appeal, the learned judge held that the commencement date to calculate the 40 day period was 7 April 2008. The learned judge had this to say at p. 12 of the Supplementary Appeal Record:

> Dalam hal ini tarikh keputusan mengenai Perakuan di bawah s. 33 telah dimaklumkan pertama kalinya kepada defendan-defendan di dalam kes 21-9-2009 adalah pada 7.4.2008 dan dan tarikh pertama kali permohonan *mandamus* dibuat pada 16.7.2008. Tarikh keputusan Mahkamah Persekutuan pada 15.10.2010 bukanlah tarikh keputusan pertama kalinya diberitahu kepada responden ataupun tarikh permohonan pertama kali dibuat.

[81] In our view, the learned judge correctly held that Her Ladyship was bound by the finding of fact expressed by Jeffrey Tan JCA (as he then was) when the second *mandamus* application came up on appeal before the Court of Appeal. The passage found in *Menteri Besar Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn. Bhd.* [2010] 5 CLJ 123 states as follows:

> … given that there was no direction that payment was suspended, the duty to pay arose upon service of the s. 33 certificate, literally upon presentation thereof. On the facts, the grounds for the application first arose on 7 April 2008, when service of the s. 33 certificate was not met with payment. Filed more than six months later on 15 October 2008 without any extension of the said 40 days, the application for judicial review was way out of time. There was a patent failure to comply with rules of court, and the order of *mandamus* should have been there and then refused.

[82] The issue now is whether there is a good reason for the application for the extension of time to be allowed. We have scrutinised the explanation for the delay proffered by the appellant. Apart from naming the wrong party and the time taken to have proceedings disposed, no other reason has been given for the delay. There is no material whatsoever has been placed before this court to explain why the appellant in any event out of time in taking out the second *mandamus* application and for that matter, even the first *mandamus* application.

[83] We find no evidence on which we are satisfied that the appellant had a good reason for failing to file the application for leave for judicial review within time. There is nothing advanced by the appellant to show that he had a good reason, or any reason at all, for that matter, for failing to file the application promptly apart from uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second *mandamus* application.

[84] It is well-established that public law remedies must be pursued with dispatch and so, time is of the essence. The case for imposition of time limit on applications for judicial review was put most forcefully by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 in the following terms at pp. 280-281:

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[85] In the text, *Civil Procedure 2010*, vol. I, popularly called "the White Book" at para. 54.5.1, it is stated:

> The Courts have always recognised that public law claims are unlike ordinary civil litigation and require strict adherence to the time limits contained in the rules governing judicial review (*R v. Institute of Chartered Accountants in England and Wales Ex p. Anderson* [1996] 8 Admin L R 557).

Conclusion

[86] After a consideration of all the factors to be weighed in order to determine whether an extension of time ought to be granted to the appellant, we are satisfied that the learned judge's exercise of her discretion was not flawed. There is no reason to interfere with her discretion not to grant an extension of time, and, therefore, by majority, we would dismiss the appeal with costs of RM10,000 and affirm the decision of the learned trial judge. Our learned brother, Justice Abdul Aziz Abdul Rahim decided to allow the appeal. Deposit to be refunded.